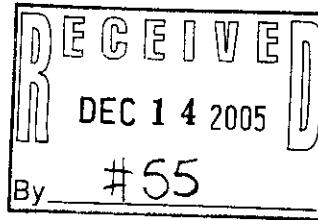


**UTAH ASSOCIATION
of FINANCIAL SERVICES**

211 East Broadway, Suite 218
Salt Lake City, Utah 84111
801-486-5769



185 South State, Suite 201
Salt Lake City Utah 84111
801-364-4403

December 13, 2005

Robert E. Feldman, Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Mr. Feldman:

The Utah Association of Financial Services ("UAFS") and Utah Bankers Association ("UBA") appreciate the opportunity to submit these comments supporting adoption of the proposed rules published in the Federal Register on October 14, 2005 relating to Parts 331 and 362 of the FDIC's regulations. If adopted, these rules would help restore parity between state banks and national banks, which is crucial to preserving the dual banking system. The UAFS and UBA are trade associations representing state chartered FDIC insured depository institutions in Utah that have a vital interest in the adoption of the proposed regulation.

The dual banking system is in crisis. Until recently, the numbers and size of state banks relative to national banks had been stable for decades. State banks represented more than 70% of the total charters and held about 45% of the nation's bank assets. In the last couple of years, the percentage of assets held in state banks declined to about 33%. By some estimates, that could decline further in the next few years to as little as 15% of assets. At that level, state banks will have relatively little significance in the banking system and their size in many states may not be sufficient to support adequately staffed and trained local regulators, resulting in the potential elimination of state bank charters in those states.

The dual banking system has benefited the banking industry and the nation for more than 150 years, more than three quarters of this nation's history. Today, the U.S. banking industry is the most innovative and robust in the world. Dual banking has played a key role in that development. Duality provides a healthy diversity that promotes innovation. The decline of dual banking would reduce competition in the financial services industry, to the detriment of bank customers, the banking industry and the nation.



Dual banking cannot work without parity between state and national banks. The crisis in dual banking is a direct result of an erosion of parity during the past few years. That erosion is caused by the expansion of the financial services markets, which are becoming increasingly national in scope. Prior to the mid 1980s, a bank could only operate in a single state and most financial services were provided locally. That made it possible for each state to adopt its own unique set of laws, regulations and standards without unduly impeding the efficient operation of the system. Since then, the financial services markets have been transformed by new networks and systems that operate seamlessly nationwide. These systems better serve the needs and convenience of most customers. Commercial clients want the benefits of competition among lenders on a national scale. Consumers want the convenience and benefits of credit cards, ATMs, home banking and other systems that work everywhere in the world at any time of day. These have become the backbone of the financial services industry nationwide.

The development of today's financial services market required major changes in the role of the states. Basically, it required preemption of state laws. A national market cannot be effectively regulated by fifty separate jurisdictions applying their own complex and non standard laws, rules and regulations. Preemption began with the Supreme Court's 1978 decision in the *Marquette* case allowing a national bank to charge interest permitted under the laws of its home state regardless of where its customer was located. That decision was based on the National Bank Act and only applied to national banks. To preserve the dual banking system, Congress had to restore parity to state banks. It could have done that by amending the National Bank Act to reinstate state jurisdiction over transactions involving a national bank. Instead, in 1980 Congress amended the FDI Act to give state chartered banks the same ability to export interest as a national bank. This clearly reflects a national policy designed to accommodate the needs of the market. In the twenty seven years since *Marquette*, Congress and the courts have consistently followed this policy and preempted state laws where needed to facilitate the development of the financial services markets and to preserve the ability of state banks to compete equally with national banks in these markets.

Recently, the OTS and the OCC determined that the safe, sound and efficient operation of their banks requires preemption of all state laws. Whether that is a proper and necessary determination will not be decided by the FDIC. What it has done is raise a question about the usefulness of a state charter for any bank serving more than a local market. Although state banks have successfully served national and multistate markets up till now, the lack of certainty about parity and the mere possibility of unequal treatment have resulted in an increasing number of banks opting for a national charter where preemption rules are expressly established. Many law firms and other consultants are beginning to advise that a national charter is the only clear choice for an institution.



Page Three

serving a multistate market. This uncertainty must be removed to preserve a meaningful role for dual banking.

To a large degree, the proposed regulations only reiterate what the law already says and should not be controversial. For example, it is already well settled that a branch of an out of state bank is subject to the laws of the host state only to the extent that those laws apply to a branch of an out of state national bank. That was the substance of *Reigle-Neal II* enacted in 1997. The larger significance of the proposed regulations might be a negative connotation with regard to parity if they are not adopted. States that do not see the broader issues are likely to object to the proposed regulation, but their long term interests will not be served by undermining the dual banking system. The lack of parity will either force Congress to take preemptive action to save the dual banking system, as it has often done in the past, or result in the decline of state chartered banks, possibly to the point where they no longer play a significant role in the banking system. That would lead to a de facto federalization of the banking system and finalize the broad preemption those same states oppose. No other outcome is possible because the financial services markets will never revert back to primarily local operations that can be efficiently and effectively regulated at the state level.

Adopting the proposed regulations will be consistent with well established national and state policies of preempting state laws when necessary to preserve parity between state and national banks. This policy is reflected in a long series of federal laws and court decisions during the past twenty five years. Following the Supreme Court's 1978 decision in *Marquette* granting national banks the authority to export home state interest rates, Congress preempted state laws when granting to state banks the same authority as a national bank to export home state interest in 1980 and to branch interstate in 1994. In 1997, Congress amended the interstate branching laws to ensure that a host state could impose its laws and regulations on a branch of a state bank based in another state only to the extent that those laws and regulations applied to a branch of a national bank based in another state. In 1999, Congress preempted state laws in several areas, including any that would otherwise restrict the ability of a state bank to exercise the new powers and authorities granted to banks and their affiliates in the Gramm-Leach-Bliley Act. The courts have consistently supported this policy in series of cases beginning with the U S Supreme Court's decisions in *Marquette* (1978) and *Smiley* (1996), and decisions by the federal appeals courts in cases such as *Cades* (1994), *Greenwood Trust* (1993), and other cases summarized in FDIC General Counsel's Opinion No. 10 issued in 1998. Many states likewise recognize the overriding importance of parity as evidenced by state "wild card laws" granting the same powers and privileges to a state bank as a national bank either automatically or by order of the state banking commissioner. We are aware of no instance since the Civil War where Congress enacted a law that did not



Page Four

preserve parity between state and national banks, nor are we aware of any instance where Congress took any action to limit or reverse the effect of a court decision or agency rule affirming parity for state and national banks

This policy is much more important than a precedent. It is critical to the safe and effective functioning of the nation's banking system and financial services markets. We believe the FDIC has the authority and responsibility to adopt these regulations to help ensure the safe and sound operation of the banks it insures.

For these reasons, the members of the UAFS and UBA support the adoption of the currently proposed regulations and urge the FDIC to formally adopt the rule at the earliest opportunity

We appreciate the opportunity to submit these comments for your consideration and hope you find them helpful.

Very truly yours,

Chairman, Board of Directors
Utah Bankers Association

President, Board of Directors
Utah Association of Financial Services